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IN THE

Supreme Court of the United States

No. 119 October Term, 195

SCHOOL DISTRICT OF THE BOROUGH OF SHENANDOAH

THE BOROUGH OF SHENANDOAH,
A Municipal Corporation Organized Under the Laws of the Commonwealth of Pennsylvania,
Petitioners

vs.

CITY OF PHILADELPHIA,
Trustee Under the Will of Stephen Girard, Deceased,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on March 19, 1951.

Opinions Below

The opinion of the Court of Common Pleas No. 2 of Philadelphia County (R. 720a) unreported.

The opinion of the Supreme Court of Pennsylvania is reported in 367 Pa. 18.

Jurisdiction

The judgment of the Supreme Court of Pennsylvania was entered on March 19, 1951. The jurisdiction of the Court is invoked under 28 U. S. C. Section 1257 (3). The constitutional question here involved, namely the validity of the Pennsylvania Statute, the Act of May 27, 1921, P. L. 1198 (52 Purdon's Statutes §661), was raised in the Trial Court by Petitioner School District's fourth point for charge (R. 634a), and by Petitioner Borough's fourth point for charge (R. 636a). Both points were identical and read as follows:

> "IV. If you conclude that the subsidence was caused by the removal of pillars in the Kehley Run Mine in the vicinity of plaintiff's property, then defendant's conduct was unlawful and, as a consequence thereof, defendant was negligent under the provisions of the Act of May 27, 1921, P. L. 1198, 52 P.S. 661."

Both were declined by the Trial Judge and Exceptions noted for the Petitioners (R. 633a, 635a).

The question was raised on appeal to the Supreme Court of Pennsylvania by paragraph eighth of Petitioners' Statement of Questions to be argued on Appeal (R. 742a). While the question was argued extensively in Petitioners' Brief filed in the Supreme Court and at the oral argument, it was not dealt with specifically in the Supreme Court's opinion. Petitioners contend that the judgments of the Supreme Court affirming the judgments n.o.v. entered by the Trial Court necessarily presupposed the unconstitutionality of the Act of May 27, 1921, P. L. 1198 (52 Purdon's Statutes §661), upon the authority of the opinion of this Court in *Pennsylvania Coal Company vs. Mahon*, 43 S. Ct. 158, 260 U. S. 393, 67 L. Ed. 322, 28 A. L. R. 1321.

Question Presented

Whether the Pennsylvania Act of May 27, 1921, P. L. 1198, known as the Kohler Act, which prohibits and renders unlawful the mining of coal so as to cause the caving in, collapse or subsidence of public buildings or streets, violates the fifth and fourteenth amendments to the Federal Constitution, insofar as it relates to adjoining landowners where no privity of estate or contract exists?

Statute Involved

The pertinent provisions of the Statute are printed in Appendix A, infra pp. 1a-2a.

Statement

Petitioners, the School District and the Borough of Shenandoah, Schuylkill County, Pennsylvania, brought actions in trespass in the Court of Common Pleas of Philadelphia County against the City of Philadelphia in its capacity as Trustee under the Will of Stephen Girard, Deceased. Both actions sought to recover damages sustained as the result of a subsidence affecting a nine-block area of Shenandoah, alleged to have been caused by the negligent withdrawal of lateral support during the progress of secondary or pillar robbing mining operations conducted in an adjoining property owned by the respondent, and leased to a tenant.

The cases were consolidated for trial in the Court of Common Pleas No. 2 where they were tried before Judge Edwin O. Lewis and a jury which, on November 1, 1949, rendered verdicts for the Plaintiff School District in the sum of $430,721.54 and for the Plaintiff Borough in the sum of $431,813.57. The general verdict in each case was accompanied by special findings with respect to causation

and negligence made in answer to specific questions put by the Trial Judge, which will be referred to hereafter (R. 612, 613a).

Respondent, in its capacity as Trustee under the Will of Stephen Girard, owns extensive coal properties in Schuylkill County, including a colliery immediately adjacent to the affected portion of Shenandoah, and known as Kehley's Run Colliery. The School District's claim was predicated upon the total destruction of one high school building, the cost of repair of another which was seriously damaged and a loss in tax revenues due to a general reduction in tax assessment valuations occasioned by the decrease in value of privately owned damaged properties in the affected area. The Borough sought to recover for damages to street paving and municipally owned water and sewer lines and a similar loss in tax revenue.

Either by the pleadings or the undisputed proof offered at the trial, it was established that a general subsidence affecting an area of approximately nine city blocks occurred in the Borough of Shenandoah on the morning of March 4, 1940. The extent of the subsidence varied from a maximum depth in excess of three feet at its center to a minimum of a few inches at its outer boundary, with consequent severe damage to the public and private structures in the affected area.

The mineral rights directly beneath the subsided area had been owned for many years by the Philadelphia and Reading Coal and Iron Company, and constituted a portion of what was known as the Indian Ridge Colliery. No active mining had been conducted in this portion of the Indian Ridge Colliery since the year 1908. Immediately adjacent and to the north of the subsided area were the mine workings of the defendant (hereafter sometimes called the Girard Estate) known as the Kehley's Run Colliery, which had been in practically continuous operation through a long succession of tenants, since the year 1853.

On May 3, 1938, following the bankruptcy of a previous tenant, the defendant entered into a new lease for Kehley's Run Colliery for a term of ten years with the Morea Coal Company, a corporation owned by one Pasquale Antonizio. Under the terms of this lease, which was offered in evidence as Plaintiffs' Exhibit No. 2 and which will be discussed at length hereafter, the tenant was obligated to mine all of the remaining removable coal in Kehley's Run Colliery and to pay royalties to the defendant thereon, without regard to the rights of adjoining property owners or surface easement owners, unless restrained from so doing by a court injunction (R. 695, 6a).

Plaintiffs called three disinterested mining engineers as expert witnesses, all of whom testified that the cause of the subsidence was the pillar robbing operations conducted in Kehley's Run Colliery immediately to the north of the subsided area during the tenancy of the Morea Coal Company during the years 1938-39 and 40. The first two experts, namely, W. Arthur Williams and Frank H. Wagner, who were graduate registered mining engineers of many years experience in this particular area, also gave it as their opinion that the subsidence would have occurred as the result of defendant's tenant's operation if the Indian Ridge Colliery, which was directly under the subsided area, had never been mined at all. Both of these gentlemen, as the result of calculations made from official mining maps furnished either by the Philadelphia and Reading Coal and Iron Company or the Girard Estate, testified that approximately 75% of the original coal in place had been left by the Philadelphia and Reading Coal and Iron Company, while the Kehley's Run Colliery had been from 90 to 95 per cent exhausted before the lease with the Morea Coal Company was entered into in 1938.

Mr. Wagner testified that in his opinion, considering the area, the strata and the type of overburden, approximately 35 or 40 per cent of the original coal in place could

be extracted with safety to the adjoining surface, which would require 60 per cent to remain in the ground.

Plaintiff's third expert witness as to the cause of the subsidence, Adolph G. Kerewicz, who, while not a graduate or registered mining engineer, nevertheless had seventeen years actual practical mining engineering experience with the Philadelphia and Reading Coal and Iron Company, also testified that in his opinion the subsidence was caused by the removal of the pillars of coal on the Kehley's Run side of the land line. As this witness expressed it, "The removal of these pillars of coal on the Kehley's Run side, with the vein pitching southward, would have a tendency to crack at right angles to the vein. By so doing it would cause a subsiding far to the south of the land line and carry the subsidence area over the Indian Ridge property in the built-up section, or under the built-up section of the Borough of Shenandoah." (N. T. Page 281.)

Mr. Kerewicz also corroborated the testimony of the two previous experts to the effect that the Philadelphia and Reading Coal and Iron Company had left 75% of the coal under [illegible] the subsided area to support the surface (N. T. Page [illegible]). Both Mr. Wagner and Mr. Williams also testified, in effect, that because of the large percentage of coal which had already been removed from the Kehley's Run Colliery, before the 1938 lease, any further mining in this area was necessarily dangerous to the adjoining surface.

That the defendant knew the condition of the Kehley's Run Colliery prior to entering into the lease in question, if it needed any proof, was evidenced by an excerpt from the report of William Parkes Millington, its mining engineer and agent, for the year 1937, in which he advised the Girard Estate that the mine was rapidly approaching exhaustion. (R. 398, etc.)

The foregoing, in barest outline is a summary of petitioners' proof with respect to the cause of the subsidence and the negligence of the defendant. After the lengthy trial,

the jury in addition to the general verdict for the plaintiffs, found specially in answer to the questions put by the Trial Judge:

1. That the subsidence was caused by the failure of support of the Kehley's Run Mine;

2. That the defendant was guilty of negligence in entering into the 1938 Lease with the Morea Coal Company; and

3. That after the Lease was made in 1938, the defendant was guilty of negligence in permitting the Morea Coal Company to continue with its mining operations in the Kehley's Run Mine. (Record 613a.)

On February 4, 1950, after argument of Defendant's motions for a new trial and for judgment non obstante veredicto before their Honors Judges James Gay Gordon, Jr., Edwin O. Lewis, and Vincent A. Carroll, defendant's motions for judgment were granted and the motions for a new trial were discharged. The opinion of this court appears at (R. pp. 720a to 740a).

The opinion of the Supreme Court of Pennsylvania affirming the entry of judgments n. o. v. by the trial court was handed down March 19, 1951.

Specification of Errors to Be Urged

The Supreme Court of Pennsylvania erred:

1. In failing to give effect to the applicable provisions of the Kohler Act as imposing a liability upon respondent.

2. In failing to give effect to Section 10, the severability clause of the Kohler Act (Appendix A, p. 2a), which preserves its constitutionality as applied to the present factual situation.

3. In affirming the action of the Court of Common Pleas No. 2, in granting judgments n.o.v.

(Non Federal)

4. In affirming the opinion of the Common Pleas Court that petitioners had failed to prove the averments in their original statements of claim namely, that the lessee conducted mining operations and was robbing pillars of coal under the supervision, direction, management and control of the defendant (Respondent).

5. In affirming the opinion of the Common Pleas Court that plaintiffs' (petitioners') amendments to their original statements of claim introduced new causes of action which were barred by the statute of limitations.

Reasons for Granting the Writ

1. The opinion of the Pennsylvania Supreme Court necessarily involves a determination that the Kohler Act is unconstitutional in its entirety, and not merely to the extent decided by this Court in Pennsylvania Coal Company v. Mahon, 43 S. Ct. 158, 260 U. S. 393, 67 L. Ed. 322.

Petitioners maintained constantly throughout the trial and before the Supreme Court that the mere violation of the Kohler Act amounted to negligence "per se" under the law of Pennsylvania and elsewhere.[1]

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[1] In Jinks v. Currie, 324 Pa. 532, the Supreme Court of Pennsylvania said:

> "This principle of negligence per se was in mind when we decided *Lane v. Muller, Inc.*, 285 Pa. 161, 131 A. 718; *Zandras v. Moffett*, 286 Pa. 477, 133 A. 817; and *Hayes v. Shomaker*, 302 Pa. 72, 152 A. 827; and is embodied in the general summary in the Restatement, Torts, sec. 286, p. 752: 'The violation of a legislative enactment by doing a prohibited act . . . makes the actor liable for an invasion of an interest of another.' The majority rule is that the violation of a statute is negligence per se: 45 C. J. 720; 20 R. C. L. 38. In *Stehle v. Jaeger Auto Machine Co.*, 225 Pa. 348, 74 A. 215, we held that the violation of a provision of the factory act regulating the employment of children was negligence per se; and in *Johnson v. Endura Mfg. Co.*, 282 Pa. 322, 325, 127 A. 635, 636, we pointed out that the violation of a penal statute may constitute negligence per se."

It is equally well settled under Pennsylvania law that the violation of a statute need not be pleaded, Goldberg v. Friedrich, 279 Pa, 572, particularly where, as here, the salient facts which bring the case within the operation of the statute have been pleaded. The original statements of claim averred the mining, the consequent subsidence, and characterized the mining as unlawful. (R. 5a, 6a, 7a, 17a, 18a, 19a.) That was clearly enough under the principle of the *Goldberg* case.

Neither of the foregoing principles are disputed by the Supreme Court's opinion. What it appears to be predicated upon primarily is the proposition that petitioners failed to prove that the lessee conducted mining operations or robbed pillars under the *supervision*, *direction*, *management* and *control* of the defendant. That the lease, which was pleaded originally (R. 5a, 6a, 12a, 13a), and which was introduced in evidence in its entirety (R. 674a to 708a), gave respondent the *right* of supervision and control and in fact directed and obligated the lessee to remove all coal (R. 695a, 696a) is beyond any question. It was precisely this situation which the Kohler Act was designed to prevent when it provided:

> "It shall be unlawful for any owner, operator, director or general manager, superintendent or other person in charge of, or *having supervision over*, any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause, etc."

It follows therefore, if the Kohler Act means what it so plainly states, the Supreme Court must have assumed its constitutional invalidity in arriving at its decision. Surely, causation and control were alleged and proven and specifically found by the jury's verdict and special findings. In failing to give the Act any effect at all, the Court simply assumed that the Act was no longer the law.

2. The constitutionality of the Kohler Act should be re-examined in the light of the facts of the present cases.

It will be remembered that the Act was originally held constitutional as a valid exercise of police power by the Supreme Court of Pennsylvania in *Mahon v. Pennsylvania Coal Company*, 274 Pa. 489 (1922), after the Court of Common Pleas had declined to afford injunctive relief, on the ground that the statute if applied to that case would be unconstitutional. A writ of error was granted, bringing the case to this Court which held the statute to be unconstitutional in *Pennsylvania Coal Company v. Mahon, supra*, in an opinion by the late Mr. Justice Holmes, with this careful introductory qualification (260 U. S. 413):

> "As applied to this case, the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far."

Wholly apart from the reasoning in the vigorous dissenting opinion of the late Mr. Justice Brandeis, in the *Mahon* case and without relying upon the desirability of a re-examination of the principles adopted by the majority opinion, petitioners contend that your honorable Court, as then constituted, would have arrived at the opposite result if the facts of the present case were then involved. One obvious distinction lies in the fact that in the *Mahon* case the right to mine coal had been reserved in the original deeds severing ownership of the mineral and surface rights (260 U. S. 414), while no such relationship had ever existed in the instant case. A second clear difference consists in the fact that no real public interest was involved in the *Mahon* case,[2] while the rights sought to be enforced here are

[2] "This is the case of a single private house," per Mr. Justice Holmes in 260 U. S. at p. 413.

wholly public in nature. A circumstance which will be discussed briefly in reason no. 3. The fact is that the Supreme Court of Pennsylvania has misconstrued an opinion of this Court interpreting the same statute and no power but this Court can correct the resulting injustice.

3. The question presented is an important one not because of the financial redress which the petitioners might obtain or only because of the future security which a reexamination might guarantee to them or to the individuals to whom they owe a public responsibility. It is vitally important in its public aspect to the future welfare of every inhabitant of a built-up anthracite community. This was recognized by the Supreme Court of Pennsylvania in its opinion when Mr. Justice Bell said (367 Pa. at p. 183): "The importance of this case to the coal regions is evidenced by the fact that 41 political subdivisions joined as intervenors in this suit." Not only did the intervenors join in the suit but through counsel filed a brief in support of the appeal, in which the applicability and constitutionality of the Kohler Act was stressed. A copy of said brief is contained herein as Appendix B.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS C. EGAN,
Counsel for Petitioners.

Date: